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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 365

MICHAEL C. SANSONE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner Michael C. Sansone prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on July 17, 1964.

OPINION BELOW.

The opinion of the Court of Appeals for the Eighth Circuit is not reported and is printed in the Appendix hereto (p. 19).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 17, 1964 (Appendix, p. 34). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED.

1. Whether the willful delivery of a false income tax return, a misdemeanor under section 7207 of the Internal Revenue Code of 1954, is a lesser included offense within section 7201 thereof, making it a felony to willfully attempt in any manner to evade one's income tax, and whether a defendant is entitled under Rule 31 (c) of this Federal Rule of Criminal Procedure to a lesser offense instruction with respect thereto.

2. Whether the willful failure to pay one's income tax, a misdemeanor under section 7203 of the Internal Revenue Code of 1954, is a lesser included offense within section 7201 thereof making it a felony to willfully attempt in any manner to evade one's income tax, and whether a defendant is entitled under Rule 31 (c) of the Federal Rules of Criminal Procedure to a lesser offense instruction with respect thereto.

3. Whether, in a prosecution for income tax evasion in which the element of willfullness and intent is established by a confession, independent corroboration of a defendant's admission of understatement of income can be considered as corroboration for that portion confessing his specific intent.

4. Whether a court, seeking to apply the rule requiring corroboration of a confession, may rely solely on certain facts which are ostensibly corroborative, yet disregard (and make a jury question of) other uncontroverted, admitted facts which render unsubstantial the corroborative effect of the facts relied upon.

STATUTES INVOLVED.

Sections 7201, 7203, and 7207 of the Internal Revenue Code of 1954 (26 U. S. C. §§ 7201, 7203, 7207) and Rule 31 (c) of the Federal Rules of Criminal Procedure are printed in the Appendix to this petition (p. 36).

STATEMENT.

Petitioner adopts in its entirety the statement of facts set forth in the opinion below (Appendix, p. 19) with the following brief additions.

At the close of the government's case (R. 156) and at the close of the entire case (R. 253), defendant-petitioner moved for judgment of acquittal on the grounds that the evidence failed to prove the specific intent element required in a section 7201 violation, and particularly because his admission as to intent had not been corroborated by substantial independent evidence.

Petitioner requested the trial court to include in its charge two instructions on lesser offenses, as follows:

> **"Defendant's Requested Instruction No. 1.**
>
> Under the law you may find a defendant guilty of a lesser crime than the crimes charged in the indictment.
>
> A statute upon which a lesser crime is based (Section 7203 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case, reads as follows:
>
> > 'Any person required under this title to pay any * * * tax, * * * who willfully fails to pay such tax, * * * at the time or times required by law or regulations, shall, in addition to other . .

penalties provided by law, be guilty of a misdemeanor.'

and then the statute provides for the penalty.

Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully failed to pay the correct tax to the United States at the time of the filing of his return, but you further find that the defendant did not willfully attempt to defeat and evade his income taxes by the filing of a false and fraudulent return, you will in your verdict say 'Guilty of violating a lesser-included offense.'

If you have a reasonable doubt as to whether defendant willfully failed to pay the correct tax when filing his income tax return or returns under any count or counts of this indictment, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts."

"Defendant's Requested Instruction No. 2.

As I have said previously, the law permits the jury to find a defendant guilty of any lesser offense which is necessarily included in the crime charged. The offense charged in the indictment here necessarily includes a lesser offense based upon the following statute (Section 7207 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case; it reads as follows:

'Any person who willfully delivers or discloses to the Secretary [of the Treasury] or his delegate any * * * return, * * *, * * * or other document known by him to be fraudulent or to be false as to any material matter.'

and then the statute provides for the penalty.

Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully delivered to the District Director of Internal Revenue at St. Louis, Missouri his and his wife's federal joint income tax return or returns for the years 1956 and 1957 which were known by him to be fraudulent or false as to any material matter, but you further find that the defendant did not willfully attempt to defeat and evade his income tax by the filing of a false and fraudulent return, you will in your verdict say 'Guilty of violating a lesser-included offense.'

If you have a reasonable doubt as to whether defendant willfully so delivered under any count or counts of this indictment his and his wife's federal joint income tax return or returns which were known by him to be fraudulent or false as to a material matter, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts."

Both of these instructions were refused, to which petitioner specifically excepted (R. 316). Instructions No. 2 and No. 1 are discussed in the first and second reasons respectively hereinafter given for this Court's grant of certiorari.

Petitioner's judgment of conviction and sentence of fifteen months imprisonment plus a fine of $2,000.00 was affirmed by the United States Court of Appeals for the Eighth Circuit on July 17, 1964 (Appendix, p. 34).

REASONS FOR GRANTING THE WRIT.

1. Certiorari should be granted on the first issue presented as a "question of general importance in the enforcement of the income tax." Such was the reason given

by this Court when it decided to resolve this matter under the Internal Revenue Code of 1939, **Achilli v. United States**, 353 U. S. 373, 374. The same considerations which prompted this Court to grant certiorari three times in order to resolve this important question under the 1939 Code (**Dillon v. United States**, 349 U. S. 914; **Berra v. United States**, 350 U. S. 910; **Achilli v. United States**, 352 U. S. 1023) now call for a grant of certiorari to resolve it under the Internal Revenue Code of 1954. Both opinions in the instant case are an open invitation by the Eighth Circuit to resolve this "difficult and close" issue; the majority opinion calls it unfortunate that this Court's reversal of **Janko v. United States**, 366 U. S. 716, at the suggestion of the Solicitor General, on the grounds of prejudicial publicity, "left the question open," see Appendix, p. 33. The concurring opinion here by the same judge who dissented in **Janko** when it was before the Eighth Circuit, also, notes the failure of this Court to resolve the question in **Janko**, supra, as perhaps supportive of the belief that his prior position is untenable, but declines to comment further because "a continued expression of my views would be in disregard of established realities," see Appendix, p. 34. "From the point of view of desiring a definitive answer," Appendix, p. 33, both opinions here share the disappointment that **Janko**, supra, did not settle the issue, and implicit in both is the hope that the instant case will be the vehicle for doing so in a matter so vital to income tax prosecutions.

It will not do to say that (it having been decided in **Achilli**, supra, that section 7207's statutory predecessor is not applicable to income tax returns), the same result follows for section 7207 of the 1954 Code. At the very time Congress enacted section 7207, it must have been aware of the Government's then use of section 3616 (a) of the 1939 Code in income tax prosecutions and intended

that section 7207 should continue to apply to income tax returns. In addition, references to section 7207 in other sections of the 1954 Code indicate that Congress intended that section 7207 apply to income tax returns. Section 7207 is specifically mentioned in section 6013 (b) (5) (B) entitled "Joint Returns of Income Tax by Husband and Wife" for the purpose of clarifying the income tax criminal liabilities of spouses. The clear wording of section 6013 (b) (5) (B) presupposes criminal liability for fraudulent income tax returns under section 7207.[1] Also, the location of section 7207 in the 1954 Code in contrast to the positioning of section 3616 (a) in the 1939 Code bolsters the conclusion that section 7207 applies to income tax returns. Section 3616 (a) appeared under the heading "General Administrative Provisions" in the 1939 Code among several statutes covering a multitude of subjects other than income taxes. Section 7207 appears in the 1954 Code in Part I of Subchapter A of Chapter 75, entitled "Crimes, Other Offenses, and Forfeitures." It thus appears from the legislative scheme of the 1954 Code that all of the penalty measures in Part I of Subchapter A of Chapter 75, incorporating section 7201 and other income tax crimes, including section 7207, were intended to apply to any and all taxing provisions unless otherwise specifically indicated.

Of prime importance to a consideration of whether or not the result reached under section 3616 (a) of the 1939 Code is applicable to section 7207 of the 1954 Code are the significant changes in wording of new section 7207 and

---

[1] That this is even the Commissioner's view is seen in his Regulation 1:6013-2 (e) (2), reading as follows:

> "(2) For the purposes of section 7206 (1) and (2) and section 7207 (relating to criminal penalties in the case of fraudulent returns) the term 'return' includes a separate return filed by a spouse with respect to a taxable year for which a joint return is made under section 6013 (b) after the filing of a separate return."

their effect on the problem of overlapping considered by this Court in **Berra v. United States**, 351 U. S. 131. Section 3616 (a) read: "Whenever any person . . . delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made . . . he shall be fined not exceeding $1,000.00 or be imprisoned not exceeding one year, or both. . . ." Section 7207 deleted from section 3616 (a) the words "with intent to defeat or evade the valuation, enumeration, or assessment intended to be made." It added the words "known by him to be fraudulent or to be false as to any matter" and the word "willfully" so that it reads: "Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000.00, or imprisoned not more than one year, or both." The significance of these changes is that they eliminate any need to prove under section 7207 the existence of a tax deficiency or a specific tax evasion intent. Thus, factual issues to be submitted to the jury under sections 7201 and 7207 of the 1954 Code are no longer identical as they were under sections 145 (b) and 3616 (a) of the 1939 Code. They no longer "cover precisely the same ground," see **Berra**, supra, 351 U. S. 134; as said in the Eighth Circuit's earlier **Dillon** case, 218 F. 2d 97, 103:

> "Section 7207 appears in the statutory context with other offenses relating to income tax offenses. It is sufficiently broad to apply to both income tax derelictions as well as to those subjects other than income taxes with which section 3616 was in juxtaposition. The only substantial portion of section 3616 which was retained and carried forward in the 1954 revision was placed with income tax derelictions. And then the

element of willfullness, absent in section 3616 but previously consistently present in offenses relating to income tax violations, was inserted."

See, also, **Berra**, supra, footnote 5, 351 U. S. 134. The overlapping in all respects of section 7207 with section 7201 can no longer be advanced as a reason for section 7207's inapplicability to income tax prosecutions and for denial of the lesser offense instruction under Rule 31 (c) of the Federal Rules of Criminal Procedure. The misdemeanor of section 7207 no longer covers precisely the same ground as the felony-evasion offense of section 7201, and it is necessarily violated in any prosecution in which the means of attempted evasion is the filing of a false return. Depending on how the jury views the other evidence in a case, it may find the filing of a false return either a willful delivery of a return known to be fraudulent under the misdemeanor provisions of section 7207 or an attempted evasion of income tax with the requisite specific intent under the felony provisions of section 7201. Unlike **Berra**, the requested instruction here would have raised a separate factual issue under section 7207, and the question is not simply one of proper sentencing. Neither the legislative history, nor the wording of the statute, nor the policy reasons which impelled this Court to conclude in **Achilli** that under the 1939 Code 3616 (a) was not applicable to income tax returns are present with respect to section 7207 of the 1954 Code, but the reasons for the resolution of this question under the 1954 Code are as compelling today as they were when this Court resolved it in **Achilli** under the 1939 Code.

2. The instant record illustrates perfectly how proof of an attempted income tax evasion under section 7201 may also include proof of a lesser included offense under section 7203. No question is present concerning section 7203's application to the income tax. The proffered instruction

here was based upon petitioner's willful failure to pay his 1957 income tax under section 7203. The prosecution's own evidence (as set out in the statement taken from petitioner, see Appendix, pp. 22-23) makes a case for a willful failure to pay a tax when due, if the jury should choose to believe petitioner's claim that his filing of his 1957 income tax return was not an attempt to evade his income tax:

> "I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and did not feel I could raise the money to pay any tax due. It was my intention to report all sales in a future year and pay the tax due. I knew that I should have reported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so."

On the other hand, the jury could have chosen to disbelieve petitioner and to regard the knowledge of his obligation to pay, his failure to pay, and his then financial condition as indicative of an attempt to defeat and evade his income taxes under the felony provisions of section 7201. The important feature for our purposes is that the evidence supported either finding of fact by the jury (the former offense under section 7203 being included in the latter offense under section 7201), but the jury was never given the opportunity to discharge fully its function as the finders of fact. It's choice was either conviction of an attempted evasion or outright acquittal—contrary to Rule 31 (c) of the Federal Rules of Court Procedure providing that a "defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense

necessarily included therein if the attempt is an offense." In **Spies v. United States**, 317 U. S. 492, this Court in speaking of the crime of income tax evasion wrote, 317 U. S. 497: "A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other offenses against the revenue laws". The instant record presents a classic example of what this Court was talking about in **Spies**; since willfulness and an additional tax owing are two of the elements of the evasion offense, it seems clear that the misdemeanor offense of willful failure to pay a correct tax must be violated in order to commit a crime under section 7201. The additional element to be found by the jury in distinguishing between the two offenses is whether or not there was sufficient affirmative action for the felony or only a non-compliance with or neglect of statutory duties for the misdemeanor.[1] It is the Eighth Circuit's failure to recognize the necessary overlapping of certain elements of the two crimes (the felony containing the additional element of affirmative action) which has caused it to reject lesser offense instructions under section 7203. see Appendix p. 31. Other courts under analogous provisions of section 7203 (involving a willful failure to supply information) have recognized the application of these principles in finding such willful failure a lesser offense in an evasion prosecution, see **Chaifetz v. United States**, 181 F. Supp. 57, affirmed, 288 F. 2d 133 (Dist. Col.), reversed on one count, 366 U. S. 209; **Kobey v. United States**, 208

[1] This requisite affirmative action was defined "by way of illustration, and not by way of limitation" as "affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct the likely effect of which would be to mislead or to conceal." *Spies v. United States*, supra, at p. 499.

F. 2d 583 (9th Cir.); **United States v. McCue**, 160 F. Supp. 595 (D. Conn.). As noted in the instant opinion, "the issue is not an easy one", Appendix p. 32; however, it is nonetheless important that it be settled. This Court's grant of certiorari in **Dillon v. United States**, 349 U. S. 914, would have resolved the question in 1955 (see question No. 2, Petition for Certiorari, No. 629, October Term, 1954), but petitioner Dillon's death caused the writ to be dismissed on the Solicitor General's suggestion of mootness, 350 U. S. 906. Now almost ten years later the matter is still alive and not being given uniform treatment by our district and appellate courts; it deserves to be laid to rest.

3. The Eighth Circuit's treatment of the issue concerning corroboration of petitioner's "confession" injects confusion into the rules laid down by this Court in **Smith v. United States**, 348 U. S. 147, and **Opper v. United States**, 348 U. S. 84, and is at variance with the method of application of these rules adopted in other circuits in recent years. The opinion below fairly and thoroughly sets forth the pertinent facts and evidence in regard to this issue; moreover, it fully recognizes the general principles of law involved:

(1) That willfulness, or specific intent, is a separate and distinct element of the crime of tax evasion, which the government must sustain the burden of proving in order to justify a conviction;

(2) That willfulness cannot be inferred from mere understatement of income;

(3) That when the government seeks to prove an element of an offense by a confession or admission, it must introduce substantial independent evidence to corroborate that confession or admission and demonstrate the trustworthiness thereof.

Yet, when applying these rules to the undisputed facts of this case, the court below employs reasoning which is in complete conflict with the interpretation given them in the other circuits. Briefly stated, the Eighth Circuit's approach is simply that independent evidence which corroborates **any** part of the confession, not necessarily that part dealing with the element sought to be proved, is adequate to satisfy the **Smith-Opper** rule.

Three separate and distinct elements comprise the crime of tax evasion: the omission of income from the return, the specific intent or willfulness, and the taxpayer's affirmative action to evade. Here the first element was clearly conceded throughout the trial; petitioner and his counsel freely admitted, at every stage of the proceeding, that the capital gain income was received and should have been included in the 1956 and 1957 returns (R. 9-12, R. 189-190, 196). The second element, specific intent, was established only by the written admission. This document (Exhibit N, R. 104) was largely devoted to facts concerning the omitted income itself, i. e., the first element of the offense. One portion of the statement, however, contains the admission by petitioner that "I knew that I should have reported the 1957 sale," and hence confesses to the second element of the crime. The absence of corroboration as to this second element was thus a principal contention urged on appeal. The Eighth Circuit, however, cited some twelve items of evidence as providing the necessary corroboration (Appendix pp. 29-30):

(1) the actual omission of the income in question from the returns;

(2) the inclusion of other capital gains items in the 1956 return;

(3) defendant's receipt of cash over and above his cost of the land;

(4) omission of the income in question from papers supplied to defendant's accountant;

(5) defendant's financial condition was good;

(6) defendant's education beyond high school level;

(7) defendant's rank as a Major in the Air Force;

(8) defendant's experience as a real estate salesman;

(9) defendant's holding a license as a real estate salesman;

(10) the inclusion of other income tax details in his returns;

(11) his deduction of interest paid on loans in connection with the transaction;

(12) his admitted awareness of the capital gains concept.

But much of this evidence corroborates the admission only insofar as it deals with the first element—the omission of income from the return. Thus, petitioner's actual omission of the income from his return, his receipt of cash over and above his cost, and omission of the income from work papers supplied to his accountant are the most substantial items of independent evidence involved, yet each corroborates only that portion of the admission dealing with the omission of income and has no bearing on the intent aspect. Among other factors cited are those which deal with items actually contained in the return, but these cannot be considered substantial because these returns were undeniably prepared in all their technical aspects by defendant's brother-in-law, an experienced accountant (R. 40-44). The skill and ability of the accountant evidencing familiarity with income tax problems is not attributable to petitioner as evidence of the latter's knowledge. The only "corroborative" evidence which might even vaguely bear on the issue of intent is peti-

tioner's education, his experience as a real estate salesman (including his holding of a salesman's license), and his general awareness of the capital gains concept. But apparently even the court below would not rely on these few smatterings as **substantial** corroboration; it simply grouped them with all of the other independent evidence, evidence which corroborated the admission only as to the **first** element of the offense, and held that the entire collection of facts and circumstances was sufficient to corroborate as to the **second** element. In short, the court treated the written admission as a singular subject, hence evidence corroborating any portion of it would tend to corroborate the entire statement.

Whether the Eighth Circuit's approach be right or wrong, it is certainly inconsistent with the interpretation given to the **Smith-Opper** rule in other Courts of Appeals. The rule has been held to require that where a confession includes various elements of an offense, each portion thereof dealing with a specific element must be substantially corroborated by independent evidence.

Scarbeck v. United States, 317 F. 2d 546 (D. C.), precisely illustrates this. Although eventually holding that the record contained the necessary corroborative evidence, the District of Columbia Court of Appeals first held that substantial independent evidence must be found to corroborate each separate element which is confessed. The same reasoning was applied in **United States v. Sapperstein**, 312 F. 2d 694, where the Fourth Circuit, in a Mann Act prosecution, noted that the confessed element of intent must be independently corroborated, even though the record was replete with evidence of the other element, i. e., interstate transportation of the female. A similar requirement was made in **Smoot v. United States**, 312 F. 2d 881 (D. C.).

Petitioner recognizes that, in evaluating whether a specific admission or confession has been sufficiently cor-

roborated, prior cases and precedents are of little value; each case must stand or fall on its own facts, and whether a Court of Appeals in a given case has reached a correct result under **Smith** and **Opper** may not be a matter of such moment as to require Supreme Court review. But, here because of the novel and conflicting approach used by the Eighth Circuit, this case now becomes one which can have wide effect in the administration of criminal justice, particularly if it receives tacit approval by a denial of certiorari. Does the requirement laid down by the Supreme Court in **Smith** and **Opper** mean that each element which the government seeks to prove by confession must be **separately** corroborated by substantial independent evidence, as the lower courts have heretofore held? Or does the **Smith-Opper** rule merely require that a confession, taken as a whole and as one entire statement, be supported by any substantial evidence which corroborates portions of it and thereby renders the entire statement legally sufficient to prove all it contains? Significantly, the problem was not specifically considered in either the **Smith** or **Opper** decision, and it was only a matter of time (particularly in view of the plethora of multi-element federal crimes on the books) before the conflict in interpretations arose. The full development of the law on this issue requires a resolution of this question, so that the **Smith-Opper** opinions can become the proper guideposts in all situations.

The issue is brought into sharper focus in the instant case when one considers the accumulation of uncontroverted evidence which refutes any inference of willfulness or specific intent on the part of the petitioner. The Eighth Circuit recognized the import of such facts as (Appendix, pp. 30-31):

(1) Petitioner dealt in his own name, employing no straw party;

(2) He affixed appropriate documentary stamps to each deed;

(3) All deeds were promptly recorded;

(4) There was no consistent pattern of under-reporting;

(5) The capital gains which were reported on the 1957 returns, and with which petitioner had some familiarity, were simple transactions and did not involve cost allocation theories;

(6) Petitioner reasonably anticipated compulsory expenditures on the property in excess of the cash realized in 1957;

(7) Petitioner's experience in real estate was very limited in a small firm.

However, the court dismisses these as merely raising issues for the jury in deciding guilt or innocence. But the court overlooks the fact that the issue of corroboration is one solely for the court, and some of these uncontroverted facts clearly minimize or eliminate the corroborative effect of the other evidence relied upon. In other words, when searching the record for the required corroboration, a court should not lift isolated facts out of context and ignore uncontroverted evidence which might totally destroy the corroborative effect of such facts or render them unsubstantial. It is one thing to say that petitioner was an experienced real estate salesman and knew about capital gains—this alone would seem to fortify admissions as to his willfulness. But it is quite a different matter when one considers that his real estate experience was very limited, and that the capital gains he knew about were simple stock transactions with no problems of cost allocation. Since these were all uncontroverted facts, conceded by both sides, with no issue as to veracity, they should have been considered in their entirety by the court in evaluating their

corroborative effect. This was not a matter to be left to the jury—it is solely the court's responsibility in the first instance to determine, as a matter of law, whether or not an admission has been substantially corroborated.

Petitioner submits that the total record here is devoid of substantial corroboration on the element of intent. But this is not the critical issue; of much greater importance is the method and approach used by the Eighth Circuit in attempting to apply the **Smith** and **Opper** rules. That the court below sought corroboration only for the entire written admission without requiring separate corroboration for each separate confessed element of the crime, and that it found substantial corroboration by resort to the plusses in favor of (while making a jury question of the uncontroverted minuses against) corroboration, are matters which should be of sufficient concern to the entire field of criminal jurisprudence to warrant a grant of certiorari.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX.

United States Court of Appeals
For the Eighth Circuit.

No. 17,399.

Michael C. Sansone,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[July 17, 1964.]

Before Vogel, Matthes and Blackmun, Circuit Judges.

Blackmun, Circuit Judge.

Michael C. Sansone, age 41, after a plea of not guilty, was convicted by a jury of a willful and knowing attempt, in violation of 26 U.S.C. §7201, to evade and defeat his federal income tax for the calendar year 1957. He had been charged in a 2-count indictment with a violation of this statute for both 1956 and 1957, but was acquitted as to 1956. Judge Harper imposed a $2,000 fine and a 15-month sentence. The defendant appealed.

The case comes down to the omission from Sansone's 1957 return of about $20,000 in long term capital gain realized upon the disposition of real estate. That the gain was realized, that it was not reported, and that it should have been reported are conceded by the defense.

The issues are (A) whether the admissible evidence established the essential element of willfulness on the part of Sansone and (B) whether he was entitled to lesser-included-offense instructions. On the first issue the

admissibility of an after-the-act affidavit executed by Sansone and given to an investigating intelligence agent assumes vital importance.

The objective facts are not in dispute. Sansone and his wife in 1956 and 1957 lived in a Saint Louis suburb. They filed joint returns for both years. Their 1957 return as filed showed adjusted gross income of $7,585 and taxable income of $2,963. The income reported consisted of Mrs. Sansone's salary as a teacher, sums received by Mr. Sansone from the Department of the Air Force, and his net income as a securities salesman. It was stipulated that the taxpayers earned and received these items in 1957. The return disclosed no capital gain or loss and no other income.

On December 6, 1955, Sansone obtained from House Hunters, Inc., an option to purchase certain land in Saint Louis County. In the following February he exercised this option and a contract for sale was signed. It ran from the vendor to the Sansones. It specified a price of $22,500, payable $17,500 in cash and $5,000 by a purchase money deed of trust on part of the real estate.

Sansone at the same time effected a sale of a portion of the land to D-X Sunray Oil Company for $20,000. Land Title Insurance Co. of St. Louis handled both Sansone's purchase and his sale to Sunray. It closed the two transactions simultaneously and issued the Sansones its check for $2,891.71. This was the amount remaining after appropriate charges and after debiting the Sansones for their $22,500 purchase price and crediting them for the $20,000 Sunray proceeds plus the deed of trust obligation. Both deeds were filed for record on March 21, 1956. This Sunray transaction resulted in 1956 gain which was not reported and which was the subject of the first and acquitted count of the indictment.

In August 1957 Sansone sold another portion of his tract. This was to Tremarco Corporation and was for a gross price of $27,000. This time Land Title issued the Sansones its check for $21,671.67, representing the net payable to them after vendor's expenses and after payment of the amount due on the deed of trust. The deed to Tremarco was immediately recorded. This Tremarco transaction resulted in 1957 gain which was not reported and which was the subject of the second and convicted count of the indictment.

In summary and to repeat: The defendant purchased a tract of land in March 1956 for $22,500. He promptly sold a portion of the same land for $20,000. In 1957 he sold another portion for $27,000. The gains realized on these respective sales were not reported in the Sansone returns for 1956 and 1957.

On the question of willfulness the government's case rested primarily upon the testimony of Steve Milosevich, of Revenue Agent John J. Conley, and of the defendant himself, and upon Sansone's own written statement hereinafter mentioned. Because of the difficulty and sensitivity of the issue, we review this evidence in some detail.

Milosevich was Mrs. Sansone's brother. He operated a delicatessen-sandwich shop. He had had some experience as a junior accountant. He prepared the Sansones' 1956 and 1957 returns. He testified that at the time he prepared the 1956 return he was "not sure" he had information that the Sansones "had a real estate transaction" but "I think at that time I may have been aware that there was" one. He also said that he prepared the 1957 return from work sheets presented to him by the taxpayers; that there was no information on those sheets pertaining to any real estate transaction other than real estate taxes paid; that again he was "not sure" whether he knew at the time he prepared the return that the

Sansones had sold a piece of property; and that he learned about the real estate transaction through conversations with the Sansones but that he did not "recall exactly when it was".

Conley was a special agent with the Intelligence Division. He and Agent Purk conferred with the Sansones in May 1960. They then lived in Phoenix, Arizona. The agents saw the defendant at his home on three successive days beginning May 3. On May 5 Conley took from the defendant a written statement subscribed and sworn to by Sansone before Conley and denominated an affidavit. This was prepared by Conley. It was admitted into evidence at the trial over objection. The statement twice recites that it was made voluntarily and goes on to state that the affiant understood it, that it was made without threat or promise of immunity, and that he had been advised as to his constitutional rights. It further recites that the Sansones' returns for 1956 and 1957 (and for 1958) were prepared by Milosevich from work papers compiled by Mrs. Sansone, and

> "I did not report the 1956 sale in our 1956 joint income tax return because I thought that I was entitled to recover my entire cost before reporting any sales in my income tax returns. I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and did not feel I could raise the money to pay any tax due. It was my intention to report all sales in a future year and pay the tax due. I knew that I should have reported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so.
>
> "My brother-in-law, Steve Milosevich, knew that we had this real estate and had made several sales,

but he did not advise us whether or not to report the 1956 and 1957 sales and the matter was not discussed with him as he merely prepared the returns from the workpaper we gave him in these years."

Conley testified that he adjusted the 1956 return to reflect the Sunray sale; that this was a short term capital gain; that he determined basis on the part sold by allocating to it a portion of the cost of the entire tract; that this allocation was based on assessed valuations approved by the Sansones on Land Title's closing statement; that he adjusted the 1957 return to include the long term capital gain on the sale to Tremarco; and that he used the assessed valuation method for determining basis of the Tremarco tract.

On cross-examination Conley testified that there are a number of approved methods for apportioning cost; that when Agent Purk made allocations for the later actual payment of the tax he used a method based on front footage; that the Sansones produced for the agents all the documents they requested, and made a place available for them in which to work; that, apart from the omission of the sales in the returns, he found no evidence that the defendant attempted to conceal any part of these transactions; that the checks the Sansones received were deposited without concealment; that the affidavit did not cover all the discussions had with the Sansones; that they discussed Fish Pot Creek which ran through the real estate; that, although the defendant was not present when the affidavit was typed, he had approved a rough draft and was given the opportunity to add anything he wished; that he examined the Sansones' bank statements; that their May 1958 statement showed a balance of $9,286.74; and that Sansone had said he wanted to pay his tax.

The defense for the 1957 case is largely concerned with Fish Pot Creek. This stream ran through the Sansone

property west of the portions sold to Sunray and Tremarco. The claim is that Sansone was confronted with large capital expenditures required to correct conditions which the creek had created; that these expenditures would be far greater than any gain realized in the 1957 sale; that any meaningful development was necessarily delayed until the Missouri Highway Commission concluded its plans for improvements to Manchester Road which bordered the property at the south and under which the creek flowed; that Sansone honestly believed that he could wait until these expenditures were ascertained and then determine whether he had any gain on the entire tract; that, although he now knows this was erroneous, it nevertheless was an honest belief which he held when his returns were filed; and that he did not intend to avoid payment of any taxes.

In support of this defense Sansone himself took the stand. He testified that his own average income in 1954 through 1956 was around $3,000 to $3,200 annually; that he desired to supplement this by acquiring a piece of property to develop; that he first saw the land in question in the winter of 1955-56 when the creek did not appear unusual; that during that winter he learned of the Commission's plans to widen Manchester Road and to straighten the creek; that in the spring he found that the stream overflowed and contained raw sewage which created an odor and a mess; that he received many complaints that summer from the mayor; that he consulted an architect in late 1956 to inspect the property and to see what could be done; that he was repeatedly in touch with the Highway Commission to ascertain their plans but was never able to find out what they were; that he did purchase the property and make the sales to Sunray and Tremarco; that he did not report the Sunray sale in his 1956 return because he had paid more for the property than the amount of that sale and thus had not re-

covered his cost; that he was told it would take a minimum of $40,000 to correct the creek; that in 1957 the creek conditions were even worse; that he received more complaints from the mayor; that he tried to fix the creek a little himself but was unsuccessful; that he often called the Commission but remained unable to get any definite information from them; that the mayor told him that he did not have the responsibility to fix the creek until the Commission produced its final plans; that the 1957 return was prepared near the last day for filing in April, 1958; that by then the Tremarco sale had been closed; and that he did not report that sale because he had been told he would have to fix the creek, because he felt the forthcoming substantial expenditure on that project was part of his cost, and because he honestly believed he didn't have to report the sales until he had recovered his entire anticipated cost. He also testified that he had told Agent Conley of the coming expenditure on the land; that it was not true, as stated in the affidavit, that he was burdened financially and could not raise money to pay any tax due; and that he was then better off financially than he ever had been. He said that he told Conley the affidavit was not complete and that it contained inaccuracies.

An architect testified that Sansone had asked him to inspect the property; that he did so in the fall of 1956; that he quoted Sansone the $40,000 minimum figure; and that he also told him it would be "stupid" to attempt this project until it was known exactly what the Highway Commission was going to do. The mayor testified that the creek had been a constant source of complaint; that he talked with Sansone on numerous occasions and told him some corrective measures would have to be taken; that he himself had attempted to accelerate the development in that area; and that he told Sansone he did not expect him to make the permanent improvement until the Commission determined its plans.

A consulting engineer also testified for the defense. He, through a corporation, owned an interest in the property immediately across Manchester Road. He told of necessary corrective measures which were required, of their cost, of discussing this problem with Sansone, and of the lack of positive information from the Commission.

A. Willfulness. The defense argument is that the record is devoid of any legally significant evidence of willfulness; that Sansone's affidavit reciting "I knew I should have reported the 1957 sale" was the only evidence indicating improper intent; and that this admission is uncorroborated and is therefore unavailable to establish the charged crime's necessary element of willfulness.

The defense at this point presses upon us certain legal propositions:

1. An intent to evade or defeat the 1957 tax is an essential element of the crime under § 7201. **Holland v. United States**, 348 U. S. 121, 139 (1954); **Canton v. United States**, 226 F. 2d 313, 322 (8 Cir. 1955), cert. denied 350 U. S. 965.

2. Willfulness is not to be inferred "from the mere understatement of income", unaccompanied by such things as a consistent pattern of underreporting large amounts of income or the failure of the taxpayer to include all his income in his books and records. **Holland v. United States**, supra, p. 139 of 348 U. S.; **Blackwell v. United States**, 244 F. 2d 423, 429 (8 Cir. 1957), cert. denied 355 U. S. 838; **Black v. United States**, 309 F. 2d 331, 337 (8 Cir. 1962); cert. denied 372 U. S. 934.

3. A defendant's after-the-fact and out-of-court admission of an essential element of an alleged crime requires corroboration. The same is true of exculpatory or explanatory statements. And

> "Each case has its own facts admitted and its own corroborative evidence, which leads to patent indi-

vidualization of the opinions. However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti.* It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while establishing independently the other necessary elements of the offense. * * * It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt."

Opper v. United States, 348 U. S. 84, 89-93 (1954). These principles are applicable to the crime of tax evasion where "there is no tangible injury which can be isolated as a corpus delicti" and "where the corroborative evidence must implicate the accused in order to show that a crime has been committed" and, specifically, where the statement is given to an investigating government official. But

> "It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a prepondérance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty. * * * All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused. * * *

> "Under the above standard the Government may provide the necessary corroboration by introducing substantial evidence, apart from petitioner's admissions, tending to show that petitioner willfully understated his taxable income."

Smith v. United States, 348 U. S. 147, 153-59 (1954). See, also, **United States v. Calderon**, 348 U. S. 160 (1954), and **Wong Sun v. United States**, 371 U. S. 471, 489, 503 (1963).

This court has recognized these principles and, as the defense suggests, the "requirement of corroboration by substantial independent evidence has not been taken lightly by this court". See, for example, **Banks v. United States**, 223 F. 2d 884, 886-87 (8 Cir. 1955), cert. denied 350 U. S. 986; **Canton v. United States**, supra, p. 317 of 226 F. 2d; **Zacher v. United States**, 227 F. 2d 219, 223-24 (8 Cir. 1955), cert. denied 350 U. S. 993.

The government does not quarrel with these rules as such. The controversy, as is so often the case, lies in their application.

At this point we note that the defense appears to concede that if the Sansone affidavit is admissible it serves to establish every element of the government's case not supplied by other proof. This narrows the issue and we accept for present purposes the defense statement of it:

> "[U]nder a full and fair review of the entire record in this case what independent evidence is there to corroborate and make trustworthy the appellant's admissions as to his intent with respect to his 1957 return and, if there is such independent evidence, is it truly substantial? * * * [H]ere he either stands or falls."

We deal here with a state of mind which is a subjective element. In **Blackwell v. United States**, supra, Judge Van Oosterhout, in speaking for this court, said, p. 429 of

244 F. 2d: "Willfulness involves a state of mind. Direct proof of willfulness is seldom available". He made essentially the same observation in **Zacher v. United States**, supra, p. 224 of 227 F. 2d. Many of the decided and cited cases are concerned with objective evidence and its proof. **Opper, Smith, Calderon, Banks, Canton**, and **Zacher**, all supra, are examples of this. But there are also cases which concern the subjective. See **Sinoot v. United States**, 312 F. 2d 881 (D. C. Cir. 1962); **United States v. Sapperstein**, 312 F. 2d 694 (4 Cir. 1963); **Scarbeck v. United States**, 317 F. 2d 546, 565-69 (D. C. Cir. 1963), cert. denied 374 U. S. 856. These are significant and helpful here.

We conclude without great difficulty that, within the words quoted from the defense brief, there is independent evidence in this record "to corroborate and make trustworthy the appellant's admissions as to his intent with respect to his 1957 return" and that such independent evidence is "truly substantial". We find this corroboration and this substantiality in the following:

(1) The omission in the 1956 and 1957 returns of the gains realized on the real estate sales; (2) the inclusion in the 1956 return, with full description, of no less than 13 separate short term capital gains and losses on securities, thereby demonstrating the defendant's awareness of the income character of a capital gain and of its measure; (3) the defendant's receipt through the two real estate sales of cash totaling more than $24,500 over and beyond his cost of the entire property, that is, after satisfaction of purchase obligations and attendant expenses; (4) the omission of any reference to the sales or their proceeds in the work papers supplied to Milosevich, despite the fact that the 1957 check from Land Title was for over $21,000 and represented the Sansone's largest cash receipt of the year; (5) the defendant's direct testimony that his financial condition in April and May 1958 was

better than it ever had been in his life; (6) his possession of an education somewhat beyond the high school level; (7) his attainment of the rank of Major in the Air Force Reserve; (8) his experience, although not an extensive one, as a securities and real estate salesman; (9) his holding of a Missouri real estate salesman's license which, under Missouri law, presumes certain competency and requires an examination, V. A. M. S., § 339.040; (10) his obvious awareness of income tax details as demonstrated by the appearance in both or one of the 1956 and 1957 returns of an exemption for his mother-in-law; of percentage deductions for (a) the expense, including depreciation, of his Cadillac automobile; (b) his telephone bill, and (c) heat and electric charges for his "home office"; of a deduction for "promotion and entertainment"; of deductions for uniforms and an automobile accident; and of the marking, in part for credit and in part for refund, of claimed overpayments due to withholding; (11) his deduction of the interest paid on the purchase money deed of trust to House Hunters, Inc., in 1956 but not in 1957 when that mortgage was paid off with the Tremarco sale resulting in the gain in question; and (12) his concession on the witness stand that he was "familiar with the reporting of capital gains".

All this in the aggregate constitutes, in our view, independent evidence of sufficiently substantial character, which in the language of **Opper**, tends "to establish the trustworthiness of the statement" in the Sansone affidavit. It "supports the essential facts admitted sufficiently to justify a jury inference of their truth". And it serves to fulfill the requirement of **Smith** that "All elements of the offense must be established by independent evidence or corroborated admissions".

We recognize that there is some force in the defense argument (1) that the Sansones made no attempt to con-

ceal through strawmen their participation in the real estate purchase and sales; (2) that federal documentary stamps in appropriate amounts were apparently utilized and, at least in one instance, were affixed prior to recording; (3) that the deeds were promptly filed for record; (4) that the Sunray transaction did not gross at more than Sansone's cost; (5) that Fish Pot Creek presented a serious pollution and route problem; (6) that Sansone was deeply concerned about this and reasonably anticipated the burden of a substantial capital expenditure for its solution; (7) that he also reasonably anticipated that the expenditure might consume all his available cash; (8) that the 1956 and 1957 returns, except for the real estate capital gains, were otherwise accepted as filed; (9) that his omitted income was confined to these two years, and did not create a pattern over a longer period; (10) that it is known that a request for a refund often leads to audit and thus contraindicates willfulness; (11) that the reported 1956 securities gains and losses were simple in character and did not involve cost allocation; and (12) that Sansone's real estate experience was not extensive and was with a very small firm. These factors and such potency as they possess are, however, for the trier of facts. They are not for us where there is substantial opposing evidence on which the jury's verdict may properly rest. That these factors did not convince the jury on the 1957 count is not a situation which we may undo on the record before us.

B. The lesser offense instructions. The defense claims prejudicial error in the trial court's refusal to charge the jury that it could find the defendant guilty of lesser crimes than the one charged by the indictment under § 7201. The statutes concerned are 26 U. S. C., §§ 7203 and 7207.

1. Section 7203. As we have noted, § 7201 is directed toward a willful attempt to evade or defeat any tax or its

payment. Section 7203 concerns a willful failure to pay a tax or make a return or keep records or supply information; violation thereof is a misdemeanor and lesser punishment ensues.

This court already has been confronted with this issue under both the 1939 and the 1954 Codes. In each instance it has been decided against the defense. **Dillon v. United States**, 218 F. 2d 97, 101 (8 Cir. 1955), cert. granted 349 U. S. 914 and dismissed 350 U. S. 906; **Janko v. United States**, 281 F. 2d 156, 164 (8 Cir. 1960), reversed on other grounds, 366 U. S. 716; **Foley v. United States**, 290 F. 2d 562, 567-69 (8 Cir. 1961), cert. denied 368 U. S. 888.

Although the issue is not an easy one, and although in **Foley**, pp. 568-69 of 290 F. 2d, we recognized that there may be situations where, under the evidence and § 7203, a defendant is entitled to lesser offense instructions, we conclude that this is not one of those situations. Here again the offense charged by the indictment was an affirmative act, namely, a willful attempt to evade tax by filing a false and fraudulent return in which taxable income was knowingly understated; it did not rest on something less than positive, such as mere willful failure to file or to pay. The trial court's instructions as to this distinction were carefully delineated. **Dillon, Janko,** and **Foley** are pertinently applicable to the facts of the present case and we adhere to our consistent rulings in those cases.

2. Section 7207. This is directed to the willful delivery or disclosure to a tax authority of any return known by the taxpayer to be fraudulent or false as to any material matter. It does not embrace in specific language, as did its antecedent, § 3616(a) of the 1939 Code, an intent to defeat or evade an assessment.

This issue, too, has been before this court and has been decided adversely to the defense. In **Janko v. United**

States, supra, pp. 164-67 of 281 F. 2d, we noted, among other things, that the lesser included offense question here was more complex than that presented by § 7203; that § 3616(a) had been held inapplicable to evasion of the income tax, **Achilli v. United States**, 353 U. S. 373 (1957); and that § 7207's positioning in the 1954 Code and a comment in the 1954 Committee Reports were of interest. Two of us concluded, for three stated reasons, that the defendant was not entitled to a lesser offense instruction under § 7207. Judge Matthes dissented on this one issue and relied in part upon prospective comments, seemingly sympathetic with his view, which has appeared in **Dillon v. United States**, supra, p. 103 of 218 F. 2d, and in **Berra v. United States**, 351 U. S. 131, 134, footnote 5 (1956).

The issue remains difficult and close, as we recognized in **Janko**, and it has not been settled by the Supreme Court. Unfortunately, from the point of view of desiring a definitive answer, the Supreme Court's reversal of **Janko**, at the suggestion of the Solicitor General, on grounds of prejudicial publicity, a point on which this court was unanimous, left the question open. We only note in passing that the Ninth Circuit seems to agree with the conclusion the **Janko** majority reached. **Redfield v. United States**, 315 F. 2d 76, 82 (9 Cir. 1963), cert. denied 369 U. S. 803. So long as the **Janko** holding on this issue remains unreversed on the books, we regard it as the law of this circuit.

Affirmed.

Matthes, Circuit Judge, Concurring

In concurring, I am constrained to add a few words in regard to the lesser offense instruction under 26 U. S. C., § 7207. In my dissenting opinion in **Janko v. United States**, 281 F. 2d 156, 171, I attempted to demonstrate that

§ 7207 was applicable to income tax returns. However, the failure of the Supreme Court to resolve this question in **Janko v. United States**, 366 U. S. 716, although afforded the opportunity to do so, may lend support to the belief that my position is untenable. At any rate, a continued expression of my views would be in disregard of established realities.

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

Crim.

Judgment.

United States Court of Appeals
For the Eighth Circuit.

No. 17,399.

September Term, 1963.

Michael C. Sansone,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Michael C. Sansone, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence, imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

July 17, 1964.

Order entered in accordance with Opinion:

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

Statutes.

26 U. S. C., §§ 7201, 7203, 7207 are as follows:

§ 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§ 7203. Willful failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax

or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

§ 7207. Fraudulent Returns, Statements, or Other Documents.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. Any person required pursuant to section 6047 (b) or (c) to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

Rule 31 (c) of the **Federal Rules of Criminal Procedure** is as follows:

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.